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In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

STATE QUESTION NO. 642

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

BRIEF FOR THE *AD HOC* COMMITTEE OF PETITION SIGNERS AND VOTERS IN SUPPORT OF A VOTE ON STATE QUESTION 642, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is the expression attendant to the initiative petition process, from certification through voting, core political speech?

2. Does Oklahoma law, as construed and applied, violate the first and fourteenth amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?

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COMES NOW the *Ad Hoc Committee of Petition Signers and Voters in Support of a Vote on State Question No. 642* and submits the following brief pursuant to Sup.Ct.R. 34.

CONSENT TO FILING

Both parties have consented to filing of this brief.[1] Letters memorializing this consent will be simultaneously filed with this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae is the *Ad Hoc* Committee of Petition Signers and Voters in Support of a Vote on State Question No. 642, a group formed solely to support the Proponents' petition for *certiorari*. A list of the individual members of the committee is at page 1a of the Appendix. The review sought by this petition is of an order by the Oklahoma Supreme Court striking State Question 642 from the ballot. The interest of the members of the *ad hoc* committee are twofold. *First,* all are voters who wanted to and would have participated in the debate and vote, had State Question No. 642 not been stricken from the ballot. *Second,* some actually signed the petition asking for the

[1] The Petitioners are represented by Kevin M. Abel. The petition was opposed by two groups of Protestants. However, one group solely protested the ballot title. The Protestants who raised the constitutional issue that is the subject of this petition were represented by Laura Emily Frossard.

vote that is now precluded by the Oklahoma Supreme Court decision.

If *certiorari* is not granted and the opinion reversed, the petition signers will be denied their right to petition the government to seek redress guaranteed by the First Amendment[2] and all members of the *ad hoc* committee would have been denied the right to publicly debate the issue framed by the petition, a right that is also guaranteed by the First Amendment to the United States Constitution.

ARGUMENT

The effect of the Oklahoma Supreme Court decision is judicial censorship contrary to the First Amendment. One-Hundred, Four-Thousand, One-Hundred and Thirty-One (104,131) registered voters in Oklahoma signed Initiative Petition 349 ("IP349") asking for a statewide vote on State Question 642. The Oklahoma Supreme court held that the number of signatures on IP349 was sufficient and that the petition was proper in all respects under Oklahoma constitutional and statutory laws authorizing an initiative petition. However, citing arguments by the

[2] Petitioners are technically only urging review for violation of the "free speech" clause in the First Amendment. However, as this court has previously held, the First Amendment right to petition clause is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable'. . . . " *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).

attorney general for the State of Oklahoma that allowing such a vote would be "costly, divisive, and unnecessary," the Oklahoma Supreme Court held that the **proposed law** was inconsistent with the federal constitution and, accordingly, struck State Question 642 from the statewide ballot. "The legal resources of the parties, the people of Oklahoma, and the judiciary would be better spent in considering a petition which is not void on its face."[3] In doing so, the Oklahoma Supreme Court took aim at the heart of the protections guaranteed by the United States Constitution under the First and Fourteenth Amendments.

REASON FOR GRANTING THE WRIT

As petitioners have pointed out, the decision by the Oklahoma Supreme Court conflicts with decisions in other jurisdictions. Petitioners' Brief at 18. The effect of the Oklahoma Supreme Court decision is to deprive this court of its role as the final arbiter in construing the Constitution in cases of actual controversy. If state courts prevent debate and a vote on proposed laws based on a purported conflict between the proposal and the federal Constitution, no case or controversy will ever arise and those state courts will become the ultimate, final word on the meaning of the federal Constitution. A recent similar decision by the Nevada Supreme court emphasizes that

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[3] *In re Initiative Petition 349*, 63 Okla. Bar J. 2386, 2393 (Aug. 4, 1992) (No. 76,437), Petitioners' Brief at App. 16A.

the issue posited by the petitioners is a recurring one with nationwide impact and importance. *Stumpf v. Law*, ___ P.2d ___, 1992 WL 235458 (Nev. Sep. 18, 1992). The very foundations of democratic government are threatened by the Oklahoma Supreme court decision. Today's decision trumps political *process* rather than law. In re Initiative Petition 349, supra p. 2398 (Opala, C.J. dissenting) (emphasis by court).

I. THE EXPRESSION ATTENDANT TO THE INITIATIVE PETITION PROCESS, FROM CERTIFICATION THROUGH VOTING, IS CORE POLITICAL SPEECH.

The initiative petition process is "speech" that lies " 'at the core of our electoral process and of the First Amendment freedoms.' " *Meyer v. Grant*, 486 U.S. 414, 425, 108 S.Ct. 1886, 1894 (1988). The phrase "core political speech" has been designated as the form of speech meriting the greatest protection under the First Amendment guarantee of free speech. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("we conclude that the publication . . . lies near the core of the First Amendment . . . 'whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect free discussion of governmental affairs.' "); *First National Bank of Boston v. Bellati*, 435 U.S. 765, 786 (1978) ("especially where, as here, . . . the speech is ultimately related to the process of governing, 'the state may prevail only upon showing a subordinated interest which is compelling . . . ' "); *Buckley v. Valeo*, 424

U.S. 1, 14 (1976) ("the First Amendment affords the broadest protection to . . . political expression . . . ' there is practically universal agreement that a major purpose of the amendment was to protect the free discussion of governmental affairs . . . ' ") *Brown v. Hartloge,* 456 U.S. 45, 53 (1982) ("the free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy – the political process"). Although protection for core political speech does not include a guarantee that the speech will be effective, speech must not be arbitrarily robbed of the potential for effecting change.

Denial of core political speech may be the main reason why the American colonists revolted against Great Britain. As reflected in the subsequently-adopted Constitution, the founding fathers were not upset at the British system of government, nor necessarily in the taxes imposed. Rather, the underlying frustration that fomented the revolution was denying the colonists a right to engage in the debate about how their lives were governed. They may lose that debate and be governed by the same laws that existed before the debate; nonetheless, the right to participate in that debate was felt so keenly that the colonists risked their lives and their savings. The colonists cry was not "no taxation," but rather "no taxation *without representation.*" Further, they enacted as the first amendment to their Constitution, protection for this speech.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both

> as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them discussion affords ordinary, adequate protection against the discrimination of noxious doctrine; the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principal of American government. They recognized the risk to which all human institutions are subject. They knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; hate menaces stable government; the path of safety lies in the opportunity to **discuss freely supposed grievances and proposed remedies;** and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added). Surely, the petition process from the beginning to the vote, is central, core political speech that the First Amendment was designed to protect. "Having decided to confer the right [of initiative], the State was obligated to do so in a manner consistent with the Constitution because . . . this case involves 'core political' speech." *Meyer v. Grant,* 486 U.S., at 420.

The role of the judiciary is not to censor petitions citizen submit to the government, nor to review the petitions for suitable content, nor still yet to protect the citizens from "costly"[4] and "divisive" debate. " 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ' " *Id.* at 420, citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

"[A] state has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated." *Brown*, 456 U.S. at 52. The effect of the Oklahoma Supreme Court decision is prior censorship of core political speech. Accordingly, this court should grant the petition for *certiorari*.

II. OKLAHOMA LAW, AS CONSTRUED AND APPLIED IN THE DECISION BELOW, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS AS A PRIOR RESTRAINT ON CORE POLITICAL SPEECH.

The fallout from the decision below has already begun. A Nevada court has stopped a nation-wide trend in its tracks by nullifying a term-limit petition, citing the case below as authority. *Stumpf v. Law*, slip. op. at 5. The

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[4] The only cost to the state was adding a few lines to a ballot that already included several other state questions.

evil[5] perpetrated by the decision below must be promptly rectified to prevent continued usurpations by other courts tempted to censor core political speech.

> It is vital to the operation of democratic government that the citizen have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting). "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the merits of conflicting arguments." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Although the First Amendment is not absolute, its protections are greatest when the government actions amount to a "prior restraint." This term has a long history. "The liberty of the press consists in laying no *previous* restraints upon publications," *Blackstone Commentaries,* 4:151 (1770).

> The term 'prior restraint' is used by the courts to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur . . . the point is that engaging in speech activities contrary to a previously-issued administrative or judicial order in fact can, at most, give rise to subsequent punishment. That is, the punishment is administered

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[5] "The evils to be prevented are not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 *Cooley,* Const. Lim. 8th ed. p. 886.

> only after the act of speech itself has already occurred.

Melville B. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment*, § 4.04 (Matthew Bender, 1984). This quotation reflects the proper role of the judiciary which role should not exist until after the speech has been uttered. Here, no judicial role may even have been necessary after the speech had occurred because the proper judicial role would not exist until and unless a law was enacted. This Court has imposed a "heavier" presumption against prior restraint. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

> Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech [after] they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Id. at 559. In an earlier opinion, Justice Harlan described actions like that of the Oklahoma Supreme Court: "In the typical censorship situation, material is brought as a matter of course before some administrative authority, who then decides on its propriety. This means that the state establishes an administrative structure, whereby all writings are reviewed before publication." *A Quantity Of Copies Of Books v. Kansas*, 378 U.S. at 222.

> . . . a prior restraint has an immediate and irreversible sanction. If it can be said that a

> threat of criminal or civil sanctions after publications 'chills' speech, prior restraint 'freezes it' at least for the time.

Nebraska Press Association v. Stewart, 427 U.S. 539, 559 (1976).

Although "prior restraints are not unconstitutional *per se*,"[6] prior restraints are only permitted in "exceptional cases." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). All of these exceptional cases are concerned with immediate, dramatic and irreversible harm to the public.[7] The core political speech throttled by the Oklahoma Supreme Court posed no possible harm to the public other than that necessarily attendant to vigorous public debate. "The State's fear that voters might make an ill-advised choice does not provide the state with a compelling justification to limiting speech." *Brown v. Hartloge*, 456 U.S. at 60. Political speech is essential to enlightening the people who are to govern themselves in a democracy.

> The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body

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[6] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Prior restraints on speech that have been upheld are those that "sought to control time, place, and circumstance, rather than content." *See Greer v. Spock*, 424 U.S. 828, 866 (1976) (Brennan, J., dissenting). Until just recently, time, place and circumstance were the only pre-balloting roles considered necessary for Oklahoma's constitutional initiative petition process.

[7] The list referenced in *Near* was reiterated in *Nebraska Press Association v. Stewart*, 427 U.S. 539, 590-3 (1976) (Brennan, J., concurring).

> politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.

A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, 75 (1965). The freedom of speech protected by the Constitution functions in "advancing knowledge and discovering truth" in "participating in decision making by all members of society." T. Emerson, *The System of Freedom of Expression*, 6-7 (1970).

Striking State Question 642 from the ballot in Oklahoma has deprived the petition signers the opportunity to debate that which they sought when they placed their names on IP349. The Oklahoma Supreme Court has denied all voters in the State of Oklahoma the opportunity to consider and debate a specific solution to the community's controversy over a particular social issue.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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November 27, 1992

APPENDIX

Ad Hoc Committee of Petition Signers and Voters in Support of a Vote On State Question No. 642

[These voters did not sign Initiative Petition 349.]

1. Appelhans, Victoria
   1419 Leo Road
   Edmond, OK 73034

2. Dunlap, Francis E.
   3900 S. Coachlight Dr.
   Edmond, OK 73013-69

3. Hopkins, Frank J.
   1616 Walnut Cove
   Edmond, OK 73013

4. Istook, Ernest J.
   6113 Inland
   Warr Acres, OK 73132

5. Johns, David W.
   3701 Ridgewood Drive
   Edmond, OK 73013

6. Johns, Mary Beth
   3701 Ridgewood Drive
   Edmond, OK 73013

7. Johns, Nathan
   3701 Ridgewood Drive
   Edmond, OK 73013

8. Johnson, Kay
   3320 Greenwing Court
   Oklahoma City, OK 73120

9. Klabzuba, Robert R.
   3405 Barberry Ct.
   Edmond, OK 73013

10. Loggie, David
7007 Trenton Road
Oklahoma City, OK 73116

11. Loggie, Kathy
7007 Trenton Road
Oklahoma City, OK 73116

12. McCreery, Michael E.
2705 Randolph Road
Edmond, OK 73013

13. McCullough, David
1425 Castlebay
Norman, OK 73071

14. McCullough, Debra
1425 Castlebay
Norman, OK 73071

15. McGinty, Karen
500 West Main
Edmond, OK 73034

16. McGinty, Keith
500 West Main
Edmond, OK 73034

17. Minnis, Martha
2905 Ridgewood Drive
Edmond, OK 73013-8036

18. Minnis, Michael
2905 Ridgewood Drive
Edmond, OK 73013-8036

19. Phillips, Doris
828 S.W. 13th Street
Moore, OK 73160

20. Phillips, William E.
828 S.W. 13th Street
Moore, OK 73160

21. Richardson, James Andrew
707 Morningside Drive
Norman, OK 73071

22. Sparks, Linda J.
1115 S.W. 65th
Oklahoma City, OK 73139

23. Wilson, Harold Matthew
1904 Raquel Rd.
Edmond, OK 73034

[These voters signed the petition]

24. Bowden, II, Philip L.
720 Branchwood Drive
Norman, OK 73072

25. Cross, Tony
1841 Oak Creek Terrace
Edmond, OK 73034

26. Depue, Linda D.
11201 S. Miller Ave.
Oklahoma City, OK 73170

27. Earnest, H. I.
9503 N. Breyont
Oklahoma City, OK 73131

28. Harriss, F. M.
2229 Laneway Circle
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29. Lasswell, Kara
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30. McGruder, Louise
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31. Ross, Fred Steven
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Norman, OK 73071

32. Tackett, Kenneth
13580 Friendship Road
Newalla, OK 74857

33. Whited, Barbara
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Midwest City, OK 73130